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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-187882

DATE: March 9, 1977

MATTER OF: Metasco, Incorporated

DIGEST:

1. Where Government's administrative error in sale of surplus property resulted in notification of award being sent to second highest bidder, award is unauthorized and must be set aside. Government is not estopped from denying validity of award where it was unaware of facts at time of award and putative contractor acts to its detriment on basis of advice from non-governmental source, rather than as result of Government action.
2. Where timely high bid is improperly returned unopened to bidder and resubmitted after bid opening, consideration of bid is proper if upon appropriate examination it appears that there was no tampering with envelope containing bid. However, such examination should be made by Postal Service rather than agency personnel.

This protest has been filed by the recipient of a surplus sales contract under Sales Invitation for Bids No. 27-7015, issued by the Defense Logistics Agency, Defense Property Disposal Service (DPDS), Battle Creek, Michigan, against the agency's attempt to set aside the contract on the grounds that the award was made erroneously.

The circumstances surrounding the erroneous award of Item 4 of the solicitation have been reported as follows:

Sealed bids on Sale No. 27-7015 were scheduled for opening at 2 p.m., November 16, 1976. An envelope referencing sale No. 27-7015 was stamped as received from Aaron Ferer & Sons Co. on November 15, 1976 at 9:17 a.m. by DPDS, but on that same date was returned unopened to Ferer after it was inadvertently placed with a stack of late bids received for Sale No. 27-7016, under which bids had been opened on November 11, 1976. The apparent high bidder on item 4 of sale No. 27-7015 was Metasco, Incorporated, and award

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was mailed to that firm on November 18, 1976. On the same date, but after the notice of award had been mailed to the protester, a Ferer representative contacted the sales contracting officer (SCO) and complained that its bid had been improperly classified as a late bid and that it was high on item 4. The SCO advised Ferer to resubmit the bid unopened. The bid was received in a new, larger envelope on November 19, 1976, and the SCO advises that "a careful examination revealed that the original bid had not been tampered with."

The SCO then telephonically contacted Metalsco to advise of the erroneous award. Metalsco in turn advised that it had received (apparently shortly prior to receipt of the telephone call) official notice of the award and that it had already sold the material in the open market based on information received two days prior from an "unofficial source," later identified as a commercial bidder's service, that its bid was high. Nonetheless, DPDS advised Metalsco that the award was of "no effect," and proceeded to make award for item 4 to Ferer. Metalsco's protest followed.

Metalsco asserts that it received a binding award and refers to paragraph D, Part 3, of the Sale by Reference pamphlet incorporated by reference into the solicitation, which provides that a written award mailed within the time for acceptance shall be deemed to result in a binding contract. However, the paragraph also provides that the award must be made to the responsible bidder whose conforming bid is most advantageous to the Government, which, of course, would have been Ferer but for the inadvertent handling of the Ferer bid.

The statute governing the disposition of surplus Government property (40 U.S.C. § 484) requires advertisements for bids to be made through such methods, and on such terms, as shall permit full and free competition which is consistent with the value and nature of the property, and that award be made to the responsible bidder whose bid, conforming to the IFB, will be most advantageous to the Government, price and other factors considered. This Office has also held that where the highest bid for the purchase of Government surplus sold under competitive bidding procedures is solicited, but through an administrative error award has been made to the second highest bidder, the interests of the United States, as well as the duty of the contracting officer to award such contracts to the highest bidder, require that such unauthorized award be set aside and award made to the highest bidder. B-169550, June 30, 1970; 36 Comp. Gen. 94 (1956). We believe a similar conclusion must be reached here. See Rogers Trading Company, Inc., B-182380, February 19, 1975, 75-1 CPD 102.

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In so concluding, we are mindful of the fact that the protester resold the property prior to the time it was notified of the erroneous award. However, we do not believe this fact can operate to estop the Government from denying the validity of the contract. In Leonard Joseph Company, B-182303, April 18, 1975, 75-1 CPD 235, we held that the following four elements must be present for an estoppel to arise:

- 1) the party to be estopped [DPDS] must know the facts;
- 2) that party must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel [Metalsco] has a right to believe it is so intended;
- 3) the latter must be ignorant of the true facts; and
- 4) it must rely on the former's conduct to its injury.

Clearly, the first and fourth elements are lacking in this case. The record shows that DPDS was unaware of the existence of a higher bid at the moment it mailed its notice of award to the protester, and it was only subsequent thereto that Ferar's representative so apprised DPDS. Moreover, it is not denied that the resale was not based on any official conduct of DPDS in awarding a contract to Metalsco, but was based on information received from a commercial source before the notice of award had been mailed. Thus, it cannot be concluded that DPDS is estopped from denying the validity of the award to Metalsco.


Metalsco also questions the moral and ethical ramifications of permitting a bidder the option, after bid opening, of resubmitting a bid even though it had been improperly returned. Obviously, the integrity of the competitive bid system is not served by permitting a bidder to submit a bid after its competitors' prices have been exposed. However, in certain circumstances we have allowed such bids to be considered where it appeared that the bid had been timely submitted and had been improperly handled by the Government. For example, we have held that where a bid was erroneously returned to the bidder, that bid could be properly submitted and considered if upon examination it appeared that the original envelope had not been opened and resealed. 50 Comp. Gen. 325, 327 (1970); B-173306, September 27, 1971.

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In both of the cited cases, however, the determination that the bid envelope had not been tampered with was made after examination by the Post Office Crime Laboratory. In this case, of course, the examination was made by DPDS officials. DPDS headquarters recognizes that "it would have been more desirable" to have the examination made by the Postal Service, but states that at this point it would not question the determination made by its sales officials because of "the known credibility of the Government personnel involved, as well as the business reputation of Ferer."

We agree that it is more appropriate for this kind of determination to be made by the Postal Service, which has the necessary facilities and technical expertise, rather than by contracting personnel who presumably are in no position to make the technical analysis upon which the determinations made in the previously cited cases were based. We think that whenever cases such as this arise, the agency should immediately refer the matter to this Office or directly to the Postal Service so that an appropriate analysis can be made. Although that was not done here, under the reported circumstances of this case, and since it appears that Metalsco does not assert that the Ferer bid was anything other than what was originally submitted but only questions on ethical grounds the propriety of ever allowing a bid to be resubmitted in a case such as this, we are not inclined to disturb the award made to Ferer.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States